No. 3320

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN ADMIRALTY

FRANK ALIOTO et al.,
Appellants.

vs.

L. A. PEDERSEN,
Appellee.

BRIEF FOR APPELLANTS.

H. W. HUTTON,
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I.

STATEMENT OF FACTS.

This is an appeal taken by libelants, about 190 in number, from a final decree rendered by Division No. 1 of the United States District Court, Northern District of California, the decree being rendered on the sustaining of general exceptions to the libel.

The libel sets forth that appellants were each hired by the appellee in San Francisco, California, to serve as seamen and fishermen on a voyage to Alaska to catch salmon, and that shipping articles were signed before the United States Shipping

Commissioner at the Port of San Francisco for the engagement, and that among other things agreed upon were the following, briefly:

That appellee agreed to pay each of the appellants three and one-quarter cents for each red or coho salmon offered for delivery at the Kwichak River in Alaska.

That the shipping articles contained the following.

> "Each Bristol Bay cannery shall employ no less than three beachmen for every line of canning machinery for tall cans operated."

That appellee had eight lines of such canning machinery but at no time employed more than seventeen beachmen; that his canning machinery was also defective, and for that reason he was never at any time able to take more than 1200 salmon per day from each of the libelants when if he had employed a sufficient number of beachmen and his canning machinery had not been defective he would have been able to take 1500 salmon per day from each of the libelants and their boats were detained in deliveries thereby and they would have each earned $292.50 under their contract more than they did earn.

That a reasonable compensation to each of the appellants under their contract of hiring depended upon appellee taking from each of the appellants all the salmon each could catch at said river, and that appellee would do so was the principal inducement for each of them to enter into the said contract.

That the contract of hiring also contained the following:

> "If any boat is detained from delivering salmon at receiving station for six hours after arrival, such boat shall be credited with twenty-five per cent (25%) additional salmon over and above the number delivered from it, and for each further hour's delay, an additional credit of twenty-five per cent (25%) shall be given boats to report at time of arrival at receiving station. The same rule to apply when boats are on the limit. Boats must have nets cleared before arriving at fish receiving station."

That the limit mentioned was an obligation on the part of appellee to pay for at least 1200 salmon every twenty-four hours, whether he took the same or not.

That while appellants were in their boats with undischarged salmon they were compelled to stay and were unable to attend to their personal wants, and that was one of the reasons why that matter was inserted in the contract also to prevent fish caught from becoming spoiled by reason of their not being canned in proper time.

That on the 5th day of July, 1918, appellants each tendered to appellee 1200 red or coho salmon within the terms of their contract; but appellee failed to take them for 24 hours; by reason of which each of the appellants became entitled to receive of appellee credit for 5700 red or coho salmon, or $146.24. That appellee had credited them with 1200 salmon each, but refused to credit any with any more.

It is further alleged that it would be and was impractical or extremely difficult to fix the actual damage suffered by each of the appellants by reason of his not taking the salmon according to contract and not taking them until the 6th day of July, 1918, when he should have taken them on the 5th.

It is also alleged that the Kwichak River is on Bristol Bay in Alaska.

II.

ASSIGNMENTS OF ERROR.

Appellants rely on each of their assignments of error, which are however very full, briefly their position is.

That the court erred in entirely disregarding the first language of the contract set out in the libel.

And it also erred by deciding, in the absence of proof at least, that in no event could appellants receive more than 1200 fish or their value, for the failure on the part of appellee to take salmon for twenty-four hours after the time they were offered for delivery, when the contract said they should each receive a credit of 5700.

That it also erred in finding and deciding that appellee had the right to place appellants on a limit of 1200 fish per day, in any event.

III.

ARGUMENT.

The following language in the contract was undoubtedly inserted therein for some purpose, and it would be the court's duty to give it effect unless it was meaningless, to wit:

> "Each Bristol Bay cannery shall employ no less than three beachmen for every line of canning machinery for tall cans operated."

Its purpose is clear from the libel, as it is alleged that by reason of the fact of defective machinery and an insufficient number of beachmen, the earnings of appellants were each reduced $292.50 for the season, as appellee was not able to take fish as appellants could have caught them, and caught them,

A reasonable compensation to each of the appellants, it is alleged, depended on appellee taking all the salmon each could catch. In the absence of any stipulation in the contract it would be implied that when one person left San Francisco to fish for another in Alaska, that the latter would take all of the salmon the other could catch. If he could refuse to take all he could refuse to take any and the trip up and down would be lost to the employee; but it is alleged that the fact that appellee would take all each appellant could catch was the principal inducement for their signing the contract.

And upon exceptions that allegation must be taken as true.

Appellants were entitled to 3 beachmen for each line of canning machines. They were seven short—

only sufficient for five and two-third lines when appellee had eight lines. It can easily be seen that the canning equipment was short as, if there had been sufficient men, eight lines could have run and the canning capacity would have increased 29.70 per cent.

Supposing appellee had but three men, and was thus able to operate but one line of canning machines; the earnings of appellants would have been still further reduced. Supposing he had none, and appellants were unable to earn anything at all, would the above language be still held meaningless? It must mean something, and it means nothing else than that appellants were entitled to eight lines of proper canning machinery, with sufficient men to operate them, and were entitled to deliver all of the salmon that that quantity of machinery operated by that number of men could can. Short of that their contract was violated and, if they suffered, they are entitled to damages. The allegations of the libel show a breach and damage.

In an expedition such as this is shown to be, it is unquestionably the duty of the employer who furnishes the instrumentalities of the service to furnish adequate means to enable a full earning capacity. If he falls short of that he has not performed his duty.

In the following cases, codfishing voyages, where of course the employer has to furnish salt to cure the fish, there was a shortage of salt, and his Honor the late Judge Hofman held that the seamen were

entitled to damages by reason of being unable to make a proper catch. There was nothing in the contracts in those cases that said the vessel should furnish so much salt or so many men—that is always implied.

The Bark Domingo, 1 Sawyer 182;
The Schooner Page, 5 id. 299.

The court held appellee had the right to put the men on a limit of 1200 fish per day. That does not appear on the face of the libel and, if it did, that right could only be dependent on appellee first doing all that was required of him to prevent the earning capacity of the appellants being reduced, that right could not be an absolute right, but dependent on a first fulfilment of all of appellee's obligations.

If appellee had the right to place appellants on a limit of 1200 salmon per day, it would be an option only to be exercised when appellants were offering more salmon than he could handle with 24 beachmen at work, but if he were unable to handle more than the 1200 by reason of the fact that he himself was in default on that part of the contract, he would not have the right to exercise the option. If he did he would enforce one part of the contract by violating another, or give himself the right by violating another part. The learned lower court in this case seems to have disregarded one part of the contract and given absolute effect to another. Contracts must be construed as a whole—all parts must be given effect.

The proper rule of construction of the parts of the contract in issue here is well stated in the case of

Russ Etc. Co. v. Muscupiable Co., 120 Cal. 521, 526.

> "The plaintiff must treat all the preceding agreements of the defendant, which remain unperformed, *as concurrent,* since he cannot enforce the performance of defendant's part of a contract while he is in default in the performance of his part of it".

That is exactly what the court said could be done in this case. Assuming appellee had an option, it held that he could exercise the option, when he was in default in such a manner as to create the necessity of such exercise.

We submit that the condition requiring three men to each line of canning machinery and proper machinery were conditions precedent to the option to place on a limit and if the option could not be exercised without the violation of the condition it could not be exercised at all. Conditions precedent must be strictly performed.

IV.

THE COURT ERRED IN DECIDING IN EFFECT THAT IN NO EVENT COULD APPELLANTS RECOVER FOR MORE THAN 1200 SALMON FOR DENTENTION.

The court evidently labored under the belief that the language in the contract was a penalty and not liquidated damages.

Whatever the common law or that of the different states may be on that subject, we must rely on what the United States Supreme Court says upon the subject.

It is needless for us to go into the history of the doctrine that under an English statute, which of course became a part of a contract, a court might fix the damages different to those stipulated in the agreement. The modern rule in the courts of the United States is to the effect that if people make contracts there is but one thing left for the courts to do—that is to enforce them according to their terms.

As to whether the terms of this contract is a penalty or liquidated damages it makes no difference whether the language describes it as a penalty or liquidated damages. The courts will, when it is necessary so to do, determine what it really is.

In this case, however, the amount to be paid is clearly *liquidated damages.*

There is one unvarying rule to the effect that where the amount is based upon the non-performance of *one act,* it must be treated as liquidated or agreed damages, and not as a penalty.

There is but one act here—the failure to take fish offered on July 5, 1918.

In the case of

U. S. v. Rubin, 227 Fed. 938.

The court said on page 942:

> "The rule is that, where the parties to a contract have agreed that a sum shall be one payable on a single event, such sum may be regarded as liquidated damages, but where the sum is made payable to secure the performance of several stipulations of varying degree of importance, it is clear the stipulated sum must be regarded as a penalty, and not as liquidated damages for a part default.

In the case of Sun Printing and Publishing Co. v. Moore, 183 U. S. page 667:

> "In Strickland v. Williams (1899), 1 Q. B. 382, Lord Justice A. L. Smith appears to have stated an additional class to those mentioned by Jessel, M. R. He said p 384): 'In my opinion, it is the law that where payment is conditioned on one event, the payment is in the nature of liquidated damages'. This but seems to reiterate the proposition of Justice Patterson in Price v. Green, previously cited. It was undoubtedly meant that the 'event' should not be the mere non-performance of an *ordinary* agreement for the payment of money. See, also, per Bramwell, B, in Sparrow v. Paris (1862), 7 Hurl, & N, 594, 599.
>
> "Now the stipulation here being considered, obviously would be within the last class, for it was a promise to pay a stipulated sum on the breach of a covenant to return the yacht to the owner."

It is thus clear that the contract provides for liquidated damages. That being the case we respectfully state to the court that the law is that in the absence of a statute on the subject of a penalty, and we have no such statute here, it is the duty of a

court, in the absence of fraud or mistake, to enforce a contract for damages according to its terms.

The whole history of the law upon this subject is clearly set forth in

> Sun Printing & Publishing Assn v. Moore, 183 U. S. 642.

All the different States of the Union have laws similar to the Statute 8 & 9 William III, c II. California has in Civil Code Secs. 1670-1671. This court, however, and the Supreme Court of the United States has recently held that the statutes of this State have no force or effect in a court of admiralty. But even under section 1671 Civil Code this contract would be enforced according to its terms.

Having no statute upon the subject this court is in the same position that the courts of England were prior to the passage of the Statute of William III.

The whole matter is fully reviewed in the above case, Sun Printing Assn. v. Moore, we quote from the syllabus as follows:

> "The naming of a stipulated sum to be paid for the non-performance of a covenant, is conclusive upon the parties in the absence of fraud or mutual mistake."
>
> Parties may, in a case where the damages are of an uncertain nature, estimate and agree upon the measure of damages which may be sustained from the breach of an agreement.

On the first of the above matters, this contract was entered into before a United States official.

Neither fraud nor mistake appear, and the court must presume that the stipulation in question was the inducement for appellants to sign the contract, and that if it had not been in the agreement they would not have entered into the agreement at all.

On the second proposition, it is alleged in the libel that it was impracticable, etc., to fix the actual damage, etc. That abundantly appears from the fact that no one could tell in advance how many fish he would catch between the 5th and 6th days of July, 1918.

In the Sun Printing case, the stipulation for damages for failure to return the yacht, and the amount to be paid in case of detention, was capable of estimation as the value of a yacht could have been ascertained by appraisement, and detention could easily be fixed on testimony of how much she was worth per day at that time. Still the court upheld the values agreed upon for non-performance of the contract, saying on pages 659, 660:

> "Upon the trial, The Sun Association introduced some evidence tending to show that the value of the yacht was a less sum than $75,000 and it claimed that the recovery should be limited to such actual damage as might be shown by the proof. The trial judge however, refused to hear further evidence offered on this subject, and in deciding the case disregarded it altogether. The rulings in this particular were made the subject of exception and error was assigned in relation thereto in the Circuit Court of Appeals. That court held that the value fixed in the contract was controlling, especially in view of the fact that a yacht had no market value.

> The complaint, that error in this regard was committed, is thus stated in argument: 'The naming of a stipulated sum to be paid for the non-performance of a covenant is not conclusive upon the parties merely in the absence of fraud or mutual mistake; that, *if the amount is disproportionate to the loss,* the court has the right and duty to disregard the particular expressions of the parties and to consider the amount named merely as a penalty even though it is specifically said to be liquidated damages.' Now it is to be conceded that the proposition thus contended for finds some support in expressions contained in some of the opinions in the cases cited to sustain it. Indeed, the contention but embodies the conception of the doctrine of penalties and liquidated damages expressed in the reasoning of the opinions in Chicago, etc. (cases cited) * * * "where actual damages can be assessed from testimony," the court must disregard any stipulation fixing the amount and require proof of the damage sustained. *We think the asserted doctrine is wrong in principle, was unknown to the common law, does not prevail in the courts of England at the present time, and is not sanctioned by the decisions of this court'.* (Italics ours) And we shall, as briefly as we can consistently with clearness, proceed to so demonstrate."

The court then demonstrates the doctrine in the pages following. It saying on pages 669, 670:

> "A court of law possesses no dispensing powers. It cannot inquire whether the parties have acted wisely or rashly, in respect to any stipulation they may have thought proper to introduce into their agreements. If they are competent to contract within the prudential rules that law has fixed as to parties, and there has been no fraud, circumvention or illegality

> in the case, the court is bound to enforce the agreement. Men may enter into improvident contracts where the advantage is knowingly and strikingly against them; they may also expend their property upon idle or worthless objects, or give it away if they please without an equivalent, in spite of the powers or interference of the court; and it is difficult to see why they may not fix for themselves by agreement in advance, a measure of compensation, however extravagant it may be, for a violation of their covenant (they surely may after it has accrued), without the intervention of a court or jury. Can it be an exception to their power to bind themselves by lawful contract? We suppose not; and regarding the intent of the parties, it is not to be doubted but that the sum of $3000.00 was fixed by them 'mutually and expressly' as they say, 'as the measure of damages for the violation of the covenant, or any of its terms or conditions'. If it be said that the measure is a hard one, it may be replied, that the defendants should not have stipulated for it; or having been thus indiscreet, they should have sought the only exemption, which was still within their power, namely, the faithful fulfillment of their agreement."

Defendant (appellee) could easily have prevented liability by unloading the salmon. He did not do so and there is nothing on the face of the libel that indicates why he should not be held for what he agreed to pay in the event that he did not do so.

We respectfully call the court's attention to pages 672, 673, 674 of the opinion, where the court holds:

> "It may, we think, fairly be stated that when a claimed disproportion has been asserted in actions at law, it has usually been an excessive

disproportion between the stipulated sum and the possible damages resulting from a trivial breach *apparent on the face of the contract,* and the question of disproportion has been simply an element entering into the consideration of the question of what was the intent of the parties, whether *bona fide* to fix the damages or to stipulate the payment of an arbitrary sum as a penalty, by way of security.

In the case at bar, aside from the agreement of the parties, the damage which might be sustained by a breach of the covenant to surrender the vessel was uncertain, and the unambiguous intent of the parties was to ascertain and fix the amount of such damage. In effect, however, the effort of the petitioner on the trial was to nullify the stipulation in question by mere proof, not that the parties did not intend to fix the value of the yacht for all purposes, but that it was improvident and unwise for its agent to make such an agreement. Substantially, the petitioner claimed a greater right than it would have had if *it* had made application to a court of equity for relief, for it tendered in its answer no issue concerning a disproportion between the agreed and actual value, averred no fraud, surprise or mistake, and stated no facts claimed to warrant a reformation from the agreement. Its alleged right to have eliminated from the agreement the clause in question, for that is precisely the logical result of the contention, was asserted for the first time at the trial by an offer of evidence on the subject of damages."

The lower court went even further in this case. It construed plain and unmistakable language that reads appellants should receive a credit of twenty-five per cent for the first six hours delay, and twenty-five per cent for each hour thereafter, to

mean that but four hours should be credited, *and in the absence of proof* that libelants could not have caught more than 1200 salmon.

The language of the contract is again clear, *that whether the men were on the limit or not,* they should be credited with the above percentage.

This is not a case within the first of the language in the last above quotation mentioned, but one where the parties in advance solemnly agreed that a certain amount should be paid for the breach mentioned. It was not a trivial breach, no question of disproportion appears, the intent of the parties is clear as to what the damages should be, appellants were about five months on the voyage, the opportunity to catch salmon only lasts about 29 days; all of that must be held to have been considered by the parties. Again, the fact that the language applies when the men are on the limit shows it was carefully considered. If the limit option is properly exercised, a man may be on the limit one day and off the next. Again, the men have the right to leave their boats; human nature requires that, and, as we have said, who can say in advance how many salmon these men could have caught between the 5th and 6th days of July, 1919. The language can be construed in no other light than enforceable liquidated damages. If we consider an admiralty court a court of equity, the following rule applies (Sun Printing Co. etc., page 661):

> "Courts of equity *will relieve against a penalty,* upon a compensation but where the covenant is to pay a particular *liquidated* sum, a court

> of equity can not make a new covenant for a man; nor is there any *room for compensation or relief,* * * * Equity declines to grant relief because of inadequacy of price, etc."

For a further very instructive case we cite:

> U. S. v. Bethlehem Steel Works, etc., 205 U. S. 119.

The language of the lower court was as follows (Transcript page 12):

> "The contract cannot reasonably be so construed as to allow them nearly five times as many salmon in the twenty-four hours during which they were prevented from fishing, as they could have been paid for had they worked."

We respectfully submit that the contract reads that appellants should have that many salmon credited to them. For aught that appears they could, and, in fact, sometimes they do, catch about that number in that time. Again, they were personally inconvenienced. It is against the law of Alaska to allow salmon to spoil. Salmon will spoil when kept too long. All those things were in the minds of the parties when appellee agreed to credit appellants with the salmon mentioned in the stipulation.

There is nothing to show the number of fish to be so credited was exorbitant if that was material. That could only be shown, if it was a fact, by proof. Quoting again from the Sun Printing Association case, on pages 673, 674:

> "When the parties to a contract, in which the damages to be ascertained growing out of a breach, are uncertain in amount, mutually agree

> that a certain sum shall be the damages, in case of failure to perform, and in language plainly expressive of such agreement, I know of no sound principle or rule applicable to the construction of contracts, that will enable a court of law to say that they intended something else. Where the sum fixed is greatly disproportionate to the presumed actual damages, probably a court of equity may relieve; but a court of law had no right to erroneously construe the intention of the parties, when clearly expressed, in the endeavor to make better contracts for them than they have made themselves. In these, as in all other cases, the courts are bound to ascertain and carry into effect the true intent of the parties," etc.

Of course we find the language of the court to be on the construction of the language. We however submit that the language of the stipulation is clear, unambiguous and unequivocal. We assume, however, that the court construed it in the light of some of the decisions that hold such language to be a penalty. The language is clearly not a penalty, but agreed damages as we have stated.

But in no event, could the amount of damage recoverable be fixed on exceptions as the court did, that leads us to the following proposition.

V.

IN THE ABSENCE OF PROOF THE COURT COULD NOT DETERMINE THAT 1200 SALMON OR THEIR VALUE WAS ALL THE DAMAGE APPELLANTS COULD SUFFER.

The court, however, did so decide, that appellants could not recover for more than 1200 salmon, although the contract reads plainly to the contrary.

Of course, the court holding that was what the contract meant, appellants were powerless to do anything further. The only thing they could do was to appeal.

In the case of

U. S. v. Rubin, 227 Fed. 938.

The action was on a bond given to the U. S. for the appearance of person in an immigration case. The government moved for a judgment on the pleadings, which the court properly held was in the nature of demurrer. The rule was denied, the court holding that proof should be taken on damages and that question tried.

If we entirely disregard the foregoing decisions of the Supreme Court of the United States, we are still within the following sound doctrine:

Los Angeles O. G. Assoc. v. Pacific S. Co., 24 Cal. Appellate 95, page 99:

> "The rule stated in section 1670 of the Civil Code, must be presumed to apply in all cases, unless the party seeking to recover upon the agreement shows by averment and proof that his case comes within the exception mentioned in section 1671. (Long Beach City S. Dist. v. Dodge, 135 Cal. 401.) Plaintiff alleged 'that it would be and was and is impracticable or extremely difficult to fix the actual damages suffered by the plaintiff by reason of said breach, to wit: the abandonment by the said Tajiri of the said contract'. This, in our judgment, is sufficient to bring the case within the exception. The demurrer, of course, admits this allegation to be true."

We have an identical allegation in the libel (Paragraph IX, page 7 of Transcript).

We respectfully submit, that libelants were entitled to damages for insufficient machinery, and an insufficient number of beachmen. And that the language on the stipulation for damages for failure to take salmon as offered for delivery is binding on appellee. That as the libel stood the exceptions should have been overruled and appellee required to answer. Proof should have been taken on the amount of damage suffered on the first cause of action and appellee held to his stipulation on the second cause of action, and therefore respectfully ask that the decree be reversed.

Dated, San Francisco,
May 10, 1919.

H. W. Hutton,
Proctor for Appellants.